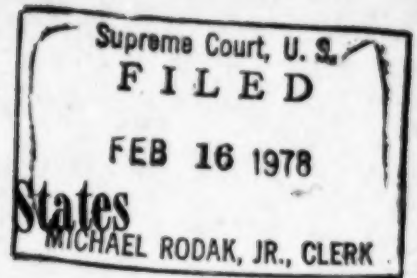


IN THE
Supreme Court of the United States



October Term, 1977

No. 77-1161

ALBERT C. DREBIN, BUDGET FILMS, INC., and LAW-
RENCE S. FINE,

Petitioners,

vs.

UNITED STATES OF AMERICA,

Respondent.

**Petition for a Writ of Certiorari to the United States
Court of Appeals for the Ninth Circuit.**

GERALD M. SINGER,

GERALD F. UELMEN,

10100 Santa Monica Blvd., 26th Floor,
Century City North Building,
Los Angeles, Calif. 90067,

Counsel for Petitioners.

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ALBERT C. DREBIN, BUDGET FILMS, INC., and LAW-
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UNITED STATES OF AMERICA,

Respondent.

**Petition for a Writ of Certiorari to the United States
Court of Appeals for the Ninth Circuit.**

The petitioners, ALBERT C. DREBIN, BUDGET FILMS, INC., and LAWRENCE S. FINE, respectfully pray that a Writ of Certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Ninth Circuit, originally entered on July 21, 1977, and which, upon Petition for Rehearing, timely filed, said judgment was amended and reentered on January 23, 1978.

Opinion Below.

The original Opinion of the Court of Appeals, reported in 557 F.2d 1316 (9th Cir. 1977) and the Amended Opinion, not yet reported, appear in the Appendix attached hereto.

Jurisdiction.

The judgment of the Court of Appeals for the Ninth Circuit was entered, as amended, on January 23, 1978. This Petition for Certiorari was filed within 30 days of that date. This Court's jurisdiction is invoked under 28 U.S.C. §1254(1).

Questions Presented.

1. MAY THE ERRONEOUS DENIAL OF A PRE-TRIAL MOTION TO SUPPRESS BE DECLARED "HARMLESS ERROR" WITH NO INQUIRY INTO THE MANNER AND EXTENT OF USE OF THE DEFENDANTS' BUSINESS RECORDS BY THE PROSECUTION IN ITS SUBSEQUENT INVESTIGATION?

2. IN A PROSECUTION FOR CRIMINAL COPYRIGHT INFRINGEMENT BY VENDING PRINTS OF MOTION PICTURES, MAY THE DEFENDANTS BE REQUIRED TO PRODUCE EVIDENCE OF PRIOR "FIRST SALES" BY THE COPYRIGHT HOLDER?

Statutory Provisions Involved.

United States Code, Title 17:

§27. THE "FIRST SALE" DOCTRINE.

"THE COPYRIGHT IS DISTINCT FROM THE PROPERTY IN THE MATERIAL OBJECT COPYRIGHTED, AND THE SALE OR CONVEYANCE, BY GIFT OR OTHERWISE, OF THE MATERIAL OBJECT SHALL NOT OF ITSELF CONSTITUTE A TRANSFER OF THE COPYRIGHT, NOR SHALL THE ASSIGNMENT OF THE COPYRIGHT CONSTITUTE

A TRANSFER OF THE TITLE TO THE MATERIAL OBJECT; BUT NOTHING IN THIS TITLE SHALL BE DEEMED TO FORBID, PREVENT, OR RESTRICT THE TRANSFER OF ANY COPY OF A COPYRIGHTED WORK THE POSSESSION OF WHICH HAS BEEN LAWFULLY OBTAINED."

§104. WILLFUL INFRINGEMENT FOR PROFIT. (Prior to revised Act, 1976)

"ANY PERSON WHO WILLFULLY AND FOR PROFIT SHALL INFRINGE ANY COPYRIGHT SECURED BY THIS TITLE, OR WHO SHALL KNOWINGLY AND WILLFULLY AID OR ABET SUCH INFRINGEMENT, SHALL BE DEEMED GUILTY OF A MISDEMEANOR, AND UPON CONVICTION THEREOF SHALL BE PUNISHED BY IMPRISONMENT FOR NOT EXCEEDING ONE YEAR OR BY A FINE OF NOT LESS THAN \$100 NOR MORE THAN \$1,000, OR BOTH, IN THE DISCRETION OF THE COURT: *PROVIDED HOWEVER,*" (Provisions which follow not pertinent)

Statement of the Case.

On January 8, 1975, 19 F.B.I. agents raided the premises of BUDGET FILMS, INC., a film rental and sales business, owned by appellants ALBERT C. DREBIN and LAWRENCE S. FINE, with a search warrant calling for the seizure of "ILLEGALLY PRODUCED AND STOLEN COPIES OF 35 mm, 16 mm, AND 8 mm MOTION PICTURE FILMS." (Clerk's Transcript "C.T." 280; Reporter's Transcript "R.T." 2531.) Eighteen hours later, the agents left

with the bulk of BUDGET'S business records, including four bulging file cabinets (R.T. 2588) and 551 prints of feature motion pictures. (C.T. 282-303.)

Defendants Moved to Suppress the evidence seized in the raid, which Motion was denied. (R.T. 92, 95-96.)

Defendants were denied the right to inspect the records of the various motion picture studios whose films were involved in the charges. No effort was made by the Government to trace prints which were sold by defendants. Its entire case hinged upon the precept that "films are never sold, but only licensed." Each Government witness then described the "licensing" arrangement by which films are distributed to theatres, non-theatrical users, television stations, the armed forces, airlines, etc. Certain select documents were presented into evidence by the Government to demonstrate the "licensing" agreements. (R.T. 414-17, 424-29, 918-19, etc.) Contrary to this evidence, the defense established that prints have been continuously sold by or under auspices of, the studios. Prints are sold to individuals (R.T. 3347, 3770, 3776, etc.), prints are resold by individuals who received lawful possession (R.T. 3773, 3774, 3292, 3294-95), and no effort was ever made by any studio to recover any print sold to any individual. (R.T. 397, 438, 450 etc.) Prints are sold by studios to salvage companies. (R.T. 3468.) Salvage companies resell prints to individuals. (R.T. 3005, 3009, 3018, 3565-67.) Certain "licensees" are permitted to send prints to salvage companies of their own choice instead of returning them.

A witness, RAYMOND ATHERTON, testified that he had purchased a number of film prints from salvage

companies, which he in turn sold to BUDGET, and that many of them had titles identical to those charged against defendants. (R.T. 3565-67, 3582-3600.)

Certain of the documents which were seized in the raid on BUDGET were introduced into evidence. (Exhibits 64-73, 90A-K.) Then, beyond the use of documents, the searching agents described the search in full detail in testimony at trial, asserting that "no records were found that documented any sales of film." (R.T. 2573.) The prosecutor embellished this testimony in argument, stating that the defendants attempted to *conceal* the sales transactions. (R.T. 2293-95, 4374.) This was a hotly contested issue. The prosecutor also argued that certain exhibits taken in the raid supported the charge of conspiracy. (R.T. 4390.) One particular seized document was a notice form extracted from a seized film can, offered as evidence that defendant DREBIN knew of a "theft problem" in the film industry and therefore had knowledge that the films sold had been stolen. (R.T. 4367-69.) It should be added that not one scrap of evidence was offered to show that any print of the titles charged to defendants was stolen or even unaccountably missing.

Pertinent Parts of the Opinions Below.

In the original opinion, filed July 1, 1977, the Court held that "the search here was an unreasonable and unlawful general search of Budget's premises. The warrant is similar to warrants found to be too general in *United States v. Marti*, 421 F.2d 1263 (2d Cir. 1970)." (At 1322.) This part of the opinion was based upon the requirement that the warrant must specifically describe the items to be seized, and that the terms "ILLEGALLY REPRODUCED AND STOL-

EN COPIES OF 35mm, 16mm and 8mm motion picture films which are duly copyrighted and protected by the provisions of the United States Copyright law, . . .," (at 1322) are not within that degree of specificity.

The Court concluded that "similar to *Marti*, this warrant left to the executing officers the task of determining what items fell within the broad categories stated in the warrant. The warrant provided no guidelines for the determination of which films had been illegally reproduced." (At 1322.)

However, the Court then held that the error in admitting this evidence "was harmless beyond a reasonable doubt." The case cited for that holding was *Chapman v. California*, 386 U.S. 18 (1967.) In so holding, the Court found that there was no reasonable possibility that the improperly admitted evidence contributed to the conviction. (At p. 1323.)

The amended Opinion, filed on January 23, 1978, followed the Petition for Rehearing by defendants. The Court had found, after more thorough analysis of the record, that certain of the "licensing agreements" were, as contended by Petitioners, in fact SALES. All of such documents were presented by the Government. The language referred to by the Court, which permitted the "licensee" to keep prints, read, "At ABC's election and cost a file-screening copy shall be retained notwithstanding subparagraph 9(c)." Thus, following the Court in a previous case, *United States v. Wise*, 550 F.2d 1180 (9th Cir. 1977) the Court reversed three of the counts of copyright infringement (Counts Six, Eight and Nine) on grounds that such language constituted "first sales" of prints of the titles "THE WAY

WE WERE" (6) "FORTY CARATS" (8) and "THE TAKE" (9). Since the Government had not traced the prints sold by defendants, there was no evidence that the prints sold may not have been the very prints "first sold" to ABC. All other counts were affirmed. The judgment also remanded to the trial court for retrial on the reversed counts and for resentencing on the counts which were affirmed.

Status of the Defendants.

All of the defendants are presently at liberty on bond.

REASONS FOR GRANTING THE WRIT OF CERTIORARI.

1. The Decision Below Conflicts With the Decisions of the Supreme Court of the United States.

The Court of Appeals held that the unlawful search was "harmless error," in spite of the fact that no hearing had been provided the defendants to determine whether the Government had sustained its burden of establishing that the evidence presented came from independent sources. This requirement was clearly set forth in *Alderman v. United States*, 394 U.S. 165, 180-185 (1969). The appropriate remedy under the *Alderman* case would be to remand the case to the District Court for an evidentiary hearing and Findings to be then reviewed by the Court of Appeals.

The entire case against Petitioners was constructed by the Government *AFTER* the search had occurred. The search took place on January 8, 1975 and the superseding indictment culminating the Government's investigation was not returned until April 3, 1975. Thus, even if *none* of the illegally seized evidence was offered at trial, there was a substantial risk that the illegally seized evidence provided investigatory leads to other items used as evidence. Under such circumstances, there can be no holding that the unlawful search was "harmless," until the defendants are provided such a hearing.

It Cannot Be Concluded That There Is No Reasonable Possibility That the Improperly Admitted Evidence Contributed to the Conviction of the Defendants.

The Court's conclusion of "harmless error" is based upon several erroneous premises. *FIRST*, the fact that Mr. Drebin had later stipulated that he was familiar

with copyright law did not render the TEN ILLEGALLY SEIZED EXHIBITS "harmless," because his stipulation was agreed to *AFTER* the said evidence had been admitted. He certainly would not have so stipulated had that evidence not been offered. Hence, the stipulation itself is a fruit of the unlawful search. The holding that the unlawfully obtained evidence is, in effect, *waived* by a later stipulation conceding that the evidence is what it purports to prove, is unconscionable. To paraphrase the words of Judge Sneed, in his dissenting opinion, cited as authority in this decision:

"IT IS PURE SPECULATION TO BELIEVE THAT THE APPELLANT WOULD HAVE (STIPULATED) HAD THE (COPYRIGHT RECORDS) BEEN SUPPRESSED, OR THAT A JURY WOULD HAVE CONVICTED HIM . . . UNDER THOSE CIRCUMSTANCES." *United States v. Hunt*, 548 F.2d 268, 271 (9th Cir. 1977).

This situation is analogous to that presented in *Simmons v. United States*, 390 U.S. 377, 389-94 (1968) where the Court held that defendant's testimony offered to establish standing on a motion to suppress, is itself inadmissible at trial.

SECOND: The Court's suggestion that the defendants' omission to challenge the sufficiency of "willfulness" evidence on appeal is somehow related to the harmlessness of the errors, indicates confusion between two distinctly different situations: a) The scope of appellate review where the evidence is viewed as most favorable to the Government, with the assumption that the jury believed all of the Government's witnesses, and b) the determination of "harmless error" where such presumptions are irrelevant and the Court must

determine the probable impact of illegal evidence on the minds of the average jury.

In this respect, it becomes significant that the issue of willfulness was a hotly contested one at trial. Resolution of that issue ultimately depended upon a question of credibility: Would the jury believe the testimony of witnesses who described the sales transactions as secretive, or would it accept the testimony offered by the defense that no effort whatsoever was made to conceal the sales?

In application of the "harmless error" doctrine, the Court *cannot* accept the testimony of those witnesses at face value, but must rather ask, "is there a reasonable possibility that the jury might not have believed these witnesses if the illegally obtained evidence had been suppressed?"

From that viewpoint, the testimony of F.B.I. agent Henkel that no records of sales of film prints were found in the search of BUDGET was of crucial importance. This testimony did more than imply that BUDGET was attempting to hide sales, as the Court suggests, but stated directly that Mr. Drebin had destroyed all records of sales in furtherance of his concealment of all such sales. (R.T. 2295.)

THIRD: The Court completely missed the point in holding that the illegally seized evidence was "harmless" because the defense subjected it to vigorous cross-examination or offered counter-evidence. The crucial inquiry must be solely this: Could the result have been possibly different had the jury not heard about, or seen the illegally seized evidence at all? Can it be said, with any reasonable certainty, that the result would have been the same either way?

The Application of the "Harmless Error" Rule Is Inappropriate Where the Constitutional Error Involved Willful Misconduct of Government Officers.

Beyond the scope of the unreasonable and illegal search by reasons of its generality, it was also unlawful because of the *perjurious statements* of F.B.I. agent Henkel, appearing in the affidavit which was used to ground the search warrant. (C.T. 310, R.T. 991-98, 1973-75, 2017-18; Exhibit AB, p. 12.) There has rarely, if ever, been an affidavit presented to a judge to obtain a search warrant containing more blatant perjury and which was as unmistakably ascertainable directly from the record, than in the affidavit of agent Henkel's. While one can understand the Court's reluctance to address this sensitive issue directly, the disposition of this case on grounds of "harmless error" in the face of such egregiously willful misconduct by a Government Agent is pointedly inappropriate.

The United States Supreme Court has consistently held that errors such as coercion of confessions or presentation of perjured testimony can *NOT* be labeled as "harmless error." *Payne v. Arkansas*, 356 U.S. 560, 568 (1958); *Napue v. Illinois*, 360 U.S. 264 (1959). Such summary dispositions would dilute the strong deterrent so vitally necessary for maintenance of respect for law enforcement agencies. Mause, "Harmless Constitutional Error: The Implications of *Chapman v. California*, 53 Minn. L.Rev. 519, 551, 551-54 (1969). To ignore restraint of such tactics is to aid inspiration to the attitude to "lie if it will aid prosecution and if you get caught, it may still be deemed 'harmless error.'"

2. The Decision Below Raises Significant and Recurring Problems Concerning the Invocation of the "Harmless Error" Ruling in Cases of Illegal Searches and Seizures.

The Ninth Circuit's opinion in this case diverts and dilutes the meaning and import of the holding in the *Alderman* case by the United States Supreme Court, as it applies to the use of illegally seized evidence. In addition to the obvious compelling reasons for further definitive guidelines in this issue, there have already developed a number of untoward consequences resulting from the decision in this case. A rash of search warrants containing the same verbiage as was ruled illegal in this case, are presently being used by the Government to raid homes and businesses in search of film prints and video tapes. A copy of one of such warrant, issued to an actor, MARK THOMAS, "supporting" a raid upon his home and the seizure of his video tape collection, is attached in the Appendix hereto. No doubt it is the Government's belief that it may use some of the seized evidence and the fruits thereof under the "harmless error" rubric.

3. The Decision Below Conflicts With the Decisions of Other Courts of Appeals as to the Proper Interpretation of the "First Sale" Doctrine.

Cases prior to this one have consistently held that it is the Government's burden to prove that no copy of a copyrighted property had been subject to a "first sale" prior to the sale charged against the defendant, in the absence of a tracing of the copy sold by defendant. Indeed, even in this case, the Government gave lip service to this burden. (Government's Brief,

p. 6.) *United States v. Wells*, 176 F.Supp. 630 (S.D. Tex. 1959); *United States v. Wise*, 550 F.2d 1180, 1190 (9th Cir. 1977); *United States v. Atherton*, 561 F.2d 747 (9th Cir. 1977); 17 United States Code, §27. Yet, there was an unmistakable inference in the opinion below in this case that this burden was the defendants'. Although the Court agreed that sales of film prints to salvage companies constitute "first sales," it held that the purchase of a print of the film, "DILLINGER" (named in Overt Act No. 10 of Count One of the Indictment) from a salvage company which had dealt with the producing studio, failed to dispel "the evidence sufficient to prove that appellants did not obtain from salvage the films which they are charged with infringing." (557 F.2d 1316, 1327.) (Emphasis added.)

Hence, even though the evidence was sufficient to prove the existence of a "first sale" of that film, it was rejected by the Court because it did not prove that the particular print with which defendants were charged came from salvage. This means that not only is it necessary for defendants to prove the absence of "first sales," but even the specific source of the prints which they sold.

In the *Atherton* case, the Court held that sales to salvage companies are "first sales." Mr. Atherton testified that he had purchased several prints from salvage companies of the same titles charged to defendants here, and that he had sold them to defendants. (R.T. 3582-3600.) Hence, this Court rejected evidence of "first sales" of the type which has been deemed probative thereof in the controlling cases, and has compounded that rejection by the requirement that the defendants prove the sources of the prints sold.

It is also interesting to note that the very print which the Court in this case ruled was properly rejected as evidence by the trial court ("DILLINGER") was held to have been improperly rejected in the *Atherton* appeal. (561 F.2d 747 at 751.) In that case, the Court held: "The evidence was *not* offered to prove that Atherton acquired the prints that he resold from a salvage company, but rather to prove that first sales had occurred, thus tending to impeach the testimony of the prosecution witnesses that the films were never 'sold.'" (at p. 751.)

The *Atherton* Court found only one print to be free of a "first sale," "THE EXORCIST," and in that case proof was offered that no 16mm prints of that film had been struck prior to the time of the sale. That Court held that failing such proof, and without tracing each print sold by defendant, there is a failure of proof of the lack of "first sales." (At p. 750.) The Court in the instant case did not follow that reasoning.

The question of what constitutes a "first sale" was clarified by the *Atherton* Court, but inconsistently rejected by the Court in this case. In *Atherton*, the Court recognized the division of authorities as to whether a sale of copies with certain restrictions constitutes a "first sale," in CIVIL matters. *Bobbs-Merrill Co. v. Straus*, (1908) 210 U.S. 339, 28 S.Ct. 722, 52 L.Ed. 1086 (Held: such a sale is a "first sale"); *Platt & Munk Co. v. Republic Graphics*, 315 F.2d 847 (2d Cir. 1963) (Held: Not a "first sale"). However, Judge Hufstedler stated, "We do not think that the just reward theory should be imported into the first sale doctrine as incorporated into Section 104, upon which this criminal prosecution is based. Rather,

we follow the trail left by *Bobbs-Merrill Co. v. Straus*, *supra*, to reach the conclusions of *Harrison* and *Independent News* and *United States v. Drebin*, *supra*, that a transfer to a salvage company for a consideration is a first sale in a Section 104 prosecution."

Finally, just as in matters dealing with illegal searches and seizures and the "harmless error" aspect, it is important that definitive guidelines be established as to the "first sale" burden and the questions as to what factors will constitute a "first sale." In reviewing the relevant cases, *Wells*, *Wise*, *Atherton*, *Bobbs-Merrill*, *Platt & Munk*, *Harrison*, *Independent News*, and this case, it is apparent that each court is going its own way with little or no recognition of any charted pathways to follow. The result of this confusion has been, and will, until corrected, continue to be, a profusion of offending search warrants supporting illegal searches and seizures and contradictory charges, culminating in a maze of conflicting decisions. Of course, the legatees of these conflicts will continue to be members of the public, the innocent along with the guilty.

Conclusion.

For these reasons, a Writ of Certiorari should issue to review the judgment and opinions of the Ninth Circuit.

Respectfully submitted,

GERALD M. SINGER,

GERALD F. UELMEN,

Counsel for Petitioners.

APPENDIX 1.

Order.

United States Court of Appeals, for the Ninth Circuit.

United States of America, Plaintiff-Appellee, v. Albert C. Drebin, Budget Films, Inc., Lawrence S. Fine and Bruce M. Venezia, Defendants-Appellants. No. 75 3475.

Filed: Jan. 23, 1978.

Before: CHAMBERS and KENNEDY, Circuit Judges, and JAMESON,* District Judge.

In a petition for rehearing appellants contend, *inter alia*, that agreements between Columbia Pictures and American Broadcasting Company for the right to televise "The Way We Were" (Count Six), "Forty Carats" (Count Eight), and "The Take" (Count Nine) are identical in their provisions to the agreement between the same parties for "Funny Girl", (Count Seven) in *United States v. Wise*, 550 F.2d 1180 (9 Cir. 1977). It is true, as appellants contend, that each of these agreements contains as part of paragraph 9(a) the language: "At ABC's election and cost a file-screening copy shall be retained notwithstanding subparagraph 9(c)." Here, as in *Wise*, there was no evidence as to whether ABC exercised its option, or, if it did, whether it resold that print. We held in *Wise* that in the absence of such proof the Government had failed in its burden of proving absence of a first sale.

This question was not raised in the district court or in the initial briefs filed by appellants in this court.

*Honorable William J. Jameson, Senior United States District Judge for the District of Montana, sitting by designation.

We have had some difficulty in locating the agreements, but find they were introduced in evidence as exhibits. In view of the fact that the Government did not prove the source of appellants' prints, but relied upon its proof that no first sales had been made to anyone, we are obliged to hold, as we did in *Wise*, that there was a failure of proof with respect to these three films. It is necessary accordingly to reverse the convictions under Counts Six, Eight, and Nine and remand for a new trial on these counts. If the Government is unable to produce proof of the source of appellants' prints of "The Way We Were," "Forty Carats," and "The Take," these counts will be subject to dismissal.

In view of the reversal of the convictions on Counts Six, Eight, and Nine, it is necessary to remand also for resentencing.

The convictions on Counts One, Two, Three, Four, Five, Seven, and Ten¹ are affirmed; the convictions on Counts Six, Eight, and Nine are reversed. The cause is remanded for a new trial on the counts which are reversed and for resentencing on the counts which are affirmed.

The motion for leave to file appellants' petition to reconsider their petition for rehearing and addendum thereto, filed herein on January 9, 1978, is denied.

¹Appellants contend that the agreement for telecast of "The New Centurions" (Count Ten) was also identical in its provisions to the agreement for "Funny Girl" (Count Seven in *United States v. Wise*). We find, however, that the agreement for "The New Centurions" did not contain the paragraph (9a) language, quoted *supra*, but rather contained language similar to the agreement for "Camelot" (Count III in *Wise*), which was found to be a license and not a sale. 550 F.2d at 1191.

OFFICE OF THE CLERK
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

Notice of Entry of Judgment

Please take notice that the judgment was filed and entered in the case noted on the attached disposition (opinion, memorandum or order). Also, please take special notice of the date of filing as it represents the date of entry of judgment.

Important Time Periods

There are fourteen (14) days from the date of entry of judgment in which to file a petition for rehearing. The mandate of the court shall issue twenty-one (21) days after the entry of judgment unless the court orders otherwise. If the court enters an order denying the petition, the mandate will issue (7) days thereafter. For further information regarding these processes, please refer to Rules 36, 40 and 41 of the Federal Rules of Appellate Procedure.

APPENDIX 2.

Opinion.

United States Court of Appeals, for the Ninth Circuit.

United States of America, Plaintiff-Appellee, v. Albert C. Drebin, Budget Films, Inc., Lawrence S. Fine and Bruce M. Venezia, Defendants-Appellants. No. 75-3475.

Filed: July 21, 1977.

Appeal from the United States District Court
for the Central District of California

Before: CHAMBERS and KENNEDY, Circuit Judges,
and JAMESON,* District Judge.

JAMESON, District Judge:

Albert Drebin, Lawrence Fine, and Budget Films, Inc. have appealed their convictions, following a jury trial, on six counts (Counts Five through Ten) of willful and for-profit infringement, by vending, of copyrighted motion pictures, in violation of 17 U.S.C. §104;¹ three counts (Counts Two through Four) of interstate and foreign transportation of stolen and converted property—the copyrighted motion pictures—in violation of 18 U.S.C. § 2314; and one count (Count One) of conspiracy to commit these offenses, in violation of 18 U.S.C. § 371.² Bruce Venezia has appealed his conviction of conspiracy (Count One).³

*Honorable William J. Jameson, Senior United States District Judge for the District of Montana, sitting by designation.

¹The indictment charged appellants with infringement of the following pictures: Count Five—"Paper Moon"; Count Six—"The Way We Were"; Count Seven—"Hot Rock"; Count Eight—"Forty Carats"; Count Nine—"The Take"; Count Ten—"The New Centurions".

²The overt acts specified in the conspiracy count alleged the unauthorized sale, in addition to the motion pictures listed in counts five through ten, of 20 additional motion picture and television films.

³The court granted Venezia's motion for acquittal on counts two through ten.

Drebin was fined \$20,000 and sentenced to concurrent one year prison terms on each of the counts, with all but three months suspended and probation for three years on condition that the fine be paid. Fine was fined \$10,000 and sentenced to concurrent nine-months prison terms under the same conditions. Venezia received a suspended six months sentence and was placed on probation for two years and fined \$1,000. Budget Films was fined a total of \$18,000.

Factual Background

Budget Films is a corporation licensed to distribute, rent, and lease films produced to many major studios and maintains an inventory of over 30,000 reels of film. In addition to film rentals, Budget sells film prints. Drebin has been president of Budget Films since its incorporation in 1969 and prior thereto was the sole owner of the business. He has been involved in the motion picture business for approximately 30 years. Fine was vice-president and later secretary-treasurer of Budget Films.

The transactions set forth in the indictment involved eight sales of numerous films to three unindicted co-conspirators, Harry Katz, Johnny Holms, and Peter Theologo, who operated film libraries or rental agencies in South Africa.

At trial it was stipulated that all of the motion pictures named in the indictment were validly copyrighted. Representatives of the motion picture studios and other copyright proprietors testified with respect to the policies and procedures of the studios in the distribution of their films. The major areas of distribution include theatrical (movie theatres), non-theatrical (private groups), television, airlines and steamships, Armed Services, "V.I.P." (prominent members of the

motion picture industry or community), and "studio accommodation" (inter-studio exchange of films for technical and casting purposes).

All of the studio representatives testified that films are not sold but are licensed for use in the various areas of distribution, and that no prints of the films listed in the indictment had been sold. They testified further that none of the defendants were authorized to possess or sell any of these films. The license agreements were admitted in evidence.

The three unindicted co-conspirators, who had been granted immunity, testified regarding the purchase of films from appellants, including the films specified in the indictment, and their shipment to South Africa.

The defense called numerous witnesses in an effort to prove that films are generally available for sale. The defense sought also, on cross-examination of government witnesses, to establish that the license and lease agreements, made by the studios of their motion pictures, were actually sales.

Testimony was received regarding the destruction of worn-out films by salvage companies. There was some conflict and ambiguity in the evidence with respect to the alleged sale of film by salvage companies.⁴

Appellants' Contentions

Appellants contend that: (1) the search of Budget Films was in violation of appellants' Fourth Amendment rights and the evidence seized should have been suppressed; (2) appellants were denied due process by (a) the Government's use of superseding indictments,

⁴The evidence presented by the respective parties will be discussed in more detail *infra*, in considering the sufficiency of the evidence to sustain the convictions.

(b) its failure to comply with an order for a bill of particulars, and (c) its "unbridled expansion of the scope of the charges"; (3) the evidence was insufficient to sustain the convictions; (4) the instructions did not accurately state the law; (5) prosecutorial misconduct deprived appellants of a fair trial; (6) the sentences imposed on Venezia were ambiguous; and (7) the prosecution was barred by the statute of limitations.

I. Search of Budget Films

On January 7, 1975, on the basis of an affidavit by an F.B.I. agent, a warrant was issued to search the Budget Films premises and seize:

" . . . illegally reproduced and stolen copies of 35mm, 16mm, and 8mm motion picture films which are duly copyrighted and protected by the provisions of the United States Copyright law embodied in Title 17, United States Code; books, records, papers and other documents relating to the manufacture and sale of such motion pictures and equipment used in the sale and distribution of such motion pictures which are the fruits and instrumentalities of violations of Title 17, United States Code, 371 and 2314."

On January 8, 1975, nineteen F.B.I. agents began the search, which continued throughout the day and the following night for a total of eighteen hours. Incident to the search, the agents seized 551 film prints and thousands of documents which were placed in several file cabinets and six or seven cardboard boxes.

Appellants' motion to suppress the evidence seized pursuant to the warrant was heard and denied on April 7, 1975. Appellants claim the court erred in

that (1) the affidavit in support of the warrant contained materially false and inaccurate information, (2) the affidavit did not state probable cause, and (3) the warrant did not specify the property to be seized with sufficient particularity to preclude a general search. We agree with appellants that the evidence should have been suppressed because the warrant authorized an unlawful general search.

The Fourth Amendment provides that no warrant shall issue except upon probable cause and "particularly describing the place to be searched, and the persons or things to be seized". "The requirement that warrants shall particularly describe the things to be seized makes general searches under them impossible and prevents the seizure of one thing under a warrant describing another. As to what is to be taken, nothing is left to the discretion of the officer executing the warrant." *Marron v. United States*, 275 U.S. 192, 196 (1927). "Technical precision of description is not required. It is only necessary that there be reasonable particularity and certainty as to the identity of the property to be searched for and seized, so that the warrant shall not be a mere roving commission." *United States v. Quantity of Extracts, Bottles, Etc.*, 54 F.2d 643, 644 (S.D. Fla. 1931).

We conclude that the search here was an unreasonable and unlawful general search of Budget's premises. The warrant is similar to warrants found to be too general in *United States v. Marti*, 421 F.2d 1263 (2 Cir. 1970). The warrants in *Marti* were directed to "any peace officer in the City of New York", and authorized a search for "certain property [which] is being used and/or possessed in violation of Section 235.05 subd. 1 (Obscenity) of the New York State

Penal Law". The Court found the warrants "deficient for failing to describe with particularity the items to be seized as required by the Fourth Amendment". The court continued: "The warrants themselves gave no guidelines to the officers as to what is obscene and what is not. Thus, the warrants on their face left to the executing officials the discretion of deciding what materials were obscene". 421 F.2d at 1268. Similar to *Marti*, this warrant left to the executing officers the task of determining what items fell within the broad categories stated in the warrant. The warrant provided no guidelines for the determination of which films had been illegally reproduced.

We conclude, however, that the error in admitting this evidence was harmless beyond a reasonable doubt. *Chapman v. California*, 386 U.S. 18 (1967). *Chapman* held that "before a federal constitutional error can be held harmless, the court must be able to declare a belief that it was harmless beyond a reasonable doubt". 386 U.S. at 24. The Court in *Harrington v. California*, 395 U.S. 250, 254 (1969), explained the function of an appellate court under *Chapman*: "Our judgment must be based on our own reading of the record and on what seems to us to have been the probable impact of the [erroneously admitted evidence] on the minds of an average jury". Citing the preceding quotation from *Harrington*, the Court in *Schneble v. Florida*, 405 U.S. 427, 432 (1972) concluded; "Thus, unless there is a reasonable possibility that the improperly admitted evidence contributed to the conviction, reversal is not required. See *Chapman v. California*, 386 U.S. 18, 24 (1967). In this case, we conclude that the 'minds of an average jury' would not have found the State's case significantly less persuasive had

the [improper] testimony . . . been excluded." In light of these principles, we examine the impact of the illegally seized evidence.

The evidence introduced against Drebin consisted of ten exhibits⁵ and was offered to show Drebin's familiarity with copyright law. Drebin later stipulated that "as early as 1961 [he] was completely familiar with the copyright laws of the United States, including the criminal provisions". In view of this stipulation, any error in admitting evidence to show Drebin's knowledge of the copyright law was harmless.

The F.B.I. agent supervising the search testified that no records of sales of film by Budget were found, implying that Budget was attempting to hide the sales. However, the defense extensively cross-examined the agent on this issue and introduced testimony of Budget's bookkeeper that records of film sales were kept in the ordinary course of business. As proof that Drebin knew of a "theft problem" in the film industry, testimony was received indicating that every can of film found at Budget had a notice affixed which read in part: "The theft of 16-mm feature films has reached

⁵We have examined all of these exhibits and find that they consisted of a Budget Films catalogue and supplement offering films for sale (which were readily available elsewhere), three letters from a company called Ivy Films concerning Budget's unauthorized leasing of films licensed for distribution to Ivy, and five documents found in a file titled "Copyright Search", consisting of communications with the Copyright Office, Library of Congress, and publications dealing with recent changes in copyright laws and with investigating and renewing copyrights. Appellant's counsel objected to most of these exhibits on the ground of relevancy, stating that Drebin "was familiar with the fact that licenses do apply to films that copyrights are involved in making pictures" and that material on "copyright and copyright search, and material of that nature" was not an issue. Government counsel contended that the material was relevant on the question of willfulness.

an all-time high. Please exercise all precautions with our films while in your possession."

This evidence went to the question of willfulness. Appellants have not challenged the sufficiency of the evidence on willfulness;⁶ nor have they shown that they were prejudiced by the improperly admitted exhibits and testimony. We are convinced that the "independent, untainted evidence" on the issue of willfulness was overwhelming". See *United States v. Hunt*, 548 F.2d 268, 269 (9 Cir. 1977).

Drebin had been involved in the motion picture business for about thirty years, and was familiar with the practice of the industry and with copyright law. Budget Films, Drebin and Fine had been licensed by several motion picture studios for nontheatrical distribution of their films and were familiar with the practice of licensing.⁷ Fine testified on deposition⁸ that he knew it was an industry-wide practice to rent, rather than sell, motion pictures. Ian Waldbaum, purchaser of films from appellants, testified that in 1973 he had a telephone conversation with Drebin during which Drebin stated that he had sold \$50,000 worth of films to an individual in South Africa who had not paid for them. When asked why he did not report this

⁶In questioning the sufficiency of the evidence to sustain the convictions, appellants contend that the Government failed to prove that the films had been "stolen, converted, or taken by fraud" and that the possession of the prints had not been lawfully obtained. They do not argue failure to prove willfulness.

⁷Counsel for appellants stipulated that Budget Films had "licenses from Warner Brothers and Columbia Pictures". The F.B.I. agent testified that Budget Films had licensing agreements with Warner Brothers for 104 films and with Columbia Pictures for 109 films. These licensing agreements were not offered in evidence; nor were any of the films which were seized.

⁸None of the appellants testified at trial.

to the authorities, Drebin replied that "[I] didn't get them legally."

John Holmes, one of the unindicted co-conspirators who purchased films from appellants, testified that Fine had told him that "it was a Federal offense to copy a film in the United States and one must be careful". Holmes testified that he concluded that the film prints being sold by appellants were illegal because of their extremely low price. He stated that while National Telefilm Associates charged \$2,000.00 for the rights on a 16-mm one-hour television program, appellants and other film dealers sold the same program for \$150.00.

Harry Katz, another unindicted co-conspirator, testified that he also concluded that appellants' prints were not legal because the sale price of the prints was "much less" than what the studios were charging for rental, and because the studios did not sell prints. Additionally, he testified that in November, 1974, Fine warned him that the F.B.I. was investigating unauthorized film sales and that Katz "should really be careful about it".

Also admitted in evidence were eleven cancelled checks payable to Venezia (and check stubs) seized from Budget, which indicated that Venezia was being paid by Budget for the resale of the film. The error in admission of this evidence was also harmless in light of other untainted evidence, discussed *infra*, which was sufficient to establish Venezia as a member of the charged conspiracy.

Based "on our own reading of the record and on what seems to us to have been the probable impact" of the illegally seized evidence on the "minds of an average jury", we find no "reasonable possibility that

the improperly admitted evidence contributed to the conviction[s]". On the facts of this case, we conclude that the Government's case would not have been "significantly less persuasive" had the illegal evidence been excluded.

II. Denial of Due Process

A. Superseding Indictments

On February 18, 1975, a four-count indictment was returned charging Drebin and Budget Films with copyright infringement. On April 3, 1975, a superseding ten count indictment was returned, based on "newly received evidence",⁹ and adding Fine and Venezia as defendants. The indictment was again superseded on May 29, 1975, to cure a pleading defect in counts two, three and four by adding the sentence, "knowing the same to have been stolen, converted, and taken by fraud".¹⁰ Appellants contend that this "uncontrolled use of superseding indictments" violated due process of law and prejudiced their ability to prepare adequately for trial. Specifically, they argue that this procedure caused the grand jury to consider the evidence in piecemeal fashion rather than in total, was used as a "judge-shopping" device, was used to avoid the time constraints of a prior court order,¹¹ allowed

⁹This indictment charged the one count of conspiracy, six counts of willful infringement, naming motion pictures different than those named in the original indictment, and three counts of interstate transportation of stolen property.

¹⁰Drebin and Budget Films were arraigned on the first indictment on March 24, 1975. All of the appellants were arraigned on the second indictment on April 7, 1975. Appellants were never arraigned on the final indictment, but proceeded to trial on August 26, 1975, without objection.

¹¹In a civil action brought by Budget Films to recover the films seized during the F.B.I. search, the district court entered an order requiring all property seized to be returned to Budget unless an indictment was returned before 5:00 p.m. on February 18, 1975.

the Government to present an entirely new case under the guise of a superseding indictment, and deprived appellants of adequate notice of the charges in sufficient time to prepare a defense. We find no merit in any of these contentions.

The second and third indictments obviously increased the scope of the prosecution initiated by the first indictment, but this does not constitute a violation of due process unless appellants were prejudiced. The only allegation of prejudice is that appellants were not afforded sufficient time to prepare a defense. The record does not support this contention. Appellants were apprised of the Government's intention to supersede on March 24, 1975 and they were arraigned on the superseding indictment on April 7. Counsel for appellants was advised on April 21 that a second superseding indictment would be returned to amend the technical defects in counts two through four. Trial on the final indictment began on August 26, 1975. Thus, appellants were fully informed of the charges against them over four months before their trial.

B. Bill of Particulars

Pursuant to appellants' motion, the court entered an order on May 22, 1975, requiring the Government to disclose, within 20 days, titles of all films referred to as overt acts in the conspiracy court which were not specified. The Government did not file a bill of particulars. At trial the Government offered evidence of sales of additional films to show intent on a theory of common scheme or plan, although Government counsel also referred to the sales as "additional overt acts in furtherance of the conspiracy". In any event, on August 15, 1975, eleven days before trial, the Govern-

ment gave appellants' counsel a list of the dates when the additional sales took place and copies of shipping documents corroborating the sales.¹²

Under these circumstances, we find no prejudice to appellants. The function of a bill of particulars is to enable the accused to prepare for trial and to prevent surprise. *United States v. Murray*, 297 F.2d 812, 819 (2 Cir. 1962), *cert. denied*, 369 U.S. 828 (1962). The appellants were furnished the information eleven days before trial and were not surprised when it was offered in evidence. Moreover, the evidence referred to records of appellants and was ascertainable by them long before trial. We conclude that there was substantial compliance with the order for a bill of particulars and the district court did not abuse its discretion in admitting this evidence.

Appellants contend further that the court erred in admitting the evidence without a limiting instruction. However, no request was made for a limiting instruction when the evidence was presented, and appellants thereby waived their objection. The failure to give the instruction in the absence of a request was not "plain error". *United States v. Rothman*, 463 F.2d 488, 490 (2 Cir. 1972), *cert. denied*, 409 U.S. 956 (1972). The evidence was properly admitted as proof of a common plan or scheme. F.R. Evid. 404(b).

III. Sufficiency of the Evidence

A. Criminal Copyright Infringement

Appellants contend that the evidence was insufficient to prove a violation of 17 U.S.C. § 104 because

¹²The Government was not aware of these sales until late July or early August, when they learned from the purchasers from South Africa that the additional sales had been made.

the Government failed to prove that the film prints specified in the indictment had not been the subject of a first sale.¹³ This court held in *United States v. Wise*, 550 F.2d 1180, 1190 (1977) that:

It is clear that the Government's burden of proof of criminal copyright infringement is three-fold: (1) infringement of a copyright (2) done willfully and (3) for profit. Implicit in its burden of proof on infringement by vending is the duty to prove the absence of a first sale as to those copyrighted articles which the defendant is charged with infringing.

We noted that "the first sale doctrine provides that where a copyright owner parts with title to a particular copy of his copyrighted work, he divests himself of his exclusive right to vend that particular copy" and his vendee "is not restricted by statute from further transfers of that copy". *Id.*, at 1187. In light of the principles set forth in *Wise* and cases discussed therein, we examine the evidence presented at trial.

1. License Agreements

As noted *supra*, representatives of the copyright proprietors of each motion picture film listed in the indictment testified that their films had never been sold, but were only licensed in the various areas for distribution and exhibition. The license agreements for the films in each area of distribution were introduced in evidence. In analyzing these agreements, we find that they are in fact licenses and not sales.

¹³This contention challenges the sufficiency of the proof of infringement. Appellants do not challenge the sufficiency of the evidence or the other elements of the crime—willfulness and for profit.

Since no purpose would be served in detailing the provisions of each agreement, we find it sufficient to state that all the agreements purported to transfer only limited rights for the distribution and exhibition of the films for a limited time. All required return of the films at the end of the license period, and nearly all reserved title to the films in the copyright owner. Of those contracts which did not reserve title, none contained terms which were inconsistent with the theory of a limited license. "The mere failure to expressly reserve title to the films does not require a finding that the films were sold, where the general tenor of the entire agreement is inconsistent with such a conclusion". *Wise*, 550 F.2d at 1191. The agreements also generally prohibited the licensee or any person from copying or duplicating any film print. Having reviewed the license agreements, we conclude that none constituted first sales.

The defense attempted to prove that motion pictures are generally bought and sold. Testimony was elicited, both on cross-examination of Government witnesses and from defense witnesses, that certain films had been sold in the past by copyright owners. However, none of these films were listed in the indictment. This evidence was insufficient to prove that any of the charged films had been subject to a first sale. The evidence might be relevant on the element of willfulness, which appellants do not challenge.

2. V.I.P. Contracts

Of the films listed in the indictment, the evidence revealed only six which had been the subject of V.I.P. license agreements. "Paper Moon" was "lent" to Peter Bogdanovich by Paramount Pictures Corporation under

an agreement which reserved title to the print in Paramount. Columbia Pictures licensed "The New Centurions", "Shamus" and "The Hireling" to several V.I.P.'s under an agreement reserving all rights to the motion picture photoplays in Columbia. CBS Television licensed several episodes of "Hawaii Five-O" to V.I.P.'s, reserving title to the prints. "Hot Rock" was "loaned" to three persons by Twentieth Century Fox Corporation. All of the agreements restricted use of the subject prints to home showings, prohibiting any commercial use of the films. The prints were required to be returned upon request of the studios or, in some cases, upon the death of the licensee. Nearly all the agreements also prohibited the copying or lending of the subject print. None of the V.I.P. agreements constituted a first sale.

3. *Salvage*

Studio representatives testified that worn-out films are sold to salvage companies, where the film is either burned, chopped up, washed to remove the images, or cut up and sold as picture leader. Representatives of salvage companies testified that, pursuant to contracts with the studios, their companies destroy worn-out film and issue certificates of destruction to the studios. They also testified that their companies do not resell full-length motion pictures films.

Appellants attempted to prove that salvage companies resell reels of film with the images intact as "fill leader". The defense theory was that anyone could purchase fill leader from the salvage companies, assemble a full-length motion picture, and resell it. No copyright violation could result from this procedure since the film had been first sold to the salvage com-

pany. Appellants argued, as they do here, that the Government therefore failed to prove the absence of a first sale beyond a reasonable doubt.

Appellants entered in evidence as exhibits two boxes, containing over 40,000 feet of film, purchased from Film Salvage Company,¹⁴ the only salvage company which deals directly with the studios. Part of the film was identified as being from the motion picture "Dillinger" (16 mm.) and was projected in court.¹⁵ Several boxes of film purchased from Film Converter Company, another salvage company, were also introduced in evidence. Testimony indicated that the boxes of film contained, in addition to portions of "Dillinger", portions of the television series "Dragnet", "S.W.A.T." and "Hennessy" and the television productions "Christmas Spirit" and "Fourteen Going on Sixteen".

Relying upon isolated portions of the testimony of salvage company witnesses, appellants make a plausible argument that the films might have come from salvage. The testimony of the salvage company witnesses is quite ambiguous, due in part to the fact that on both direct and cross-examination it was elicited largely through leading questions.¹⁶ When viewed as a whole, however, we find the evidence sufficient to prove that appellants did not obtain from salvage the films which they are charged with infringing.

¹⁴The film was purchased by Charles Parker, the fiancée of Drebin's daughter. The purchase was made in the name of Hollywood Film Exchange, Venezia's employer.

¹⁵The infringement of "Dillinger" was charged in overt act ten of the conspiracy count.

¹⁶The salvage company witnesses were called by the defendants although apparently they had been subpoenaed by both parties. On the whole their evidence was more favorable to the Government than to appellants.

Testimony of the salvage company representatives indicated that they sell fill leader only in strips ranging from 150 to 300 feet in length, making it nearly impossible for anyone to piece together a complete motion picture. The manager of Film Salvage Company testified that the movie studios never sell complete films to his company. He also testified that Film Salvage Company sells fill leader to only approximately five companies which have legitimate need of the leader for "editorial purposes".¹⁷ Film Salvage does not sell fill leader to any "individual [who comes] in off the street. . . ." Film Salvage had never sold any film to appellants, nor had Film Converter Company.

While the defense testimony regarding the purchase of portions of "Dillinger" from Film Salvage Company is favorable to the defense theory, it is inconclusive and insubstantial. The witness who purchased the film was uncertain whether the entire movie was contained in the purchased film. Furthermore, an executive of American International Pictures, Inc., the copyright owner of "Dillinger", testified that A.I.P. had never sent a 16 mm. copy of that film to Film Salvage for junking. The Vice President of Film Treat Company, a corporation that rejuvenates A.I.P. 16 mm. films, testified that his company never sent Film Salvage any 16 mm. copies of "Dillinger".

We conclude that there was sufficient evidence on which to find appellants guilty of criminal copyright infringement.

¹⁷The "editorial purpose" for which the leader is used is to splice the leader to good film so that it can be wrapped around the good film on a reel to protect it. The images are left on the leader to make splicing simpler.

B. *Interstate Transportation of Stolen Property*

1. *"Property Stolen, Converted or Taken by Fraud"*

Conviction under 18 U.S.C. § 2314¹⁸ requires proof that the property transported was "stolen, converted or taken by fraud". Appellants contend first that the Government's evidence on this point was insufficient for the same reasons urged in regard to criminal copyright infringement—that the evidence was insufficient to prove that none of the films had ever been sold. For the reasons stated, we conclude that the evidence on this point was sufficient. Moreover, the Government need not establish the stolen character of the goods by direct evidence. *United States v. De Kunchak*, 467 F.2d 432, 436 (2d Cir. 1972).

2. *Value of Goods*

Nor do we find merit in appellants' second contention that the Government failed to prove a value of \$5,000 or more. In the first place, studio representatives testified that the cost of production and revenues received from each of the movies and television series charged in the indictment exceeded one million dollars.

Additionally, there was substantial evidence of the films' value on a "thieves' market". Peter Theologo testified that on June 20, 1974, he purchased one hundred episodes of the television series "Big Valley" from Budget Films, Drebin, and Fine for \$5,-

¹⁸18 U.S.C. § 2314 provides in pertinent part:

Whoever transports in interstate or foreign commerce any goods, wares, merchandise, securities or money, of the value of \$5,000 or more, knowing the same to have been stolen, converted or taken by fraud; . . .

Shall be fined not more than \$10,000 or imprisoned not more than ten years, or both . . .

500.¹⁹ In early June, 1974, he purchased seventeen episodes of "Judd For The Defense", one episode of "Mission Impossible", one episode of "O'Hare" and approximately one hundred episodes of "Big Valley", for which he paid a total of \$9,200. Of the four series involved, "Big Valley" and "O'Hare" were charged in the indictment. The jury could reasonably have inferred from this testimony that the one hundred episodes of "Big Valley" and one episode of "O'Hare" were worth in excess of \$5,000. Finally, John Holmes testified that on September 11, 1974, he purchased eighty-one films from Budget Films, Drebin, and Fine for which he paid over \$14,000. Of the eighty-one films, forty-six were named in the indictment, again allowing the jury to infer that the value exceeded \$5,000. The evidence provided ample proof of value in excess of the jurisdictional amount.

C. Venezia's Conviction on Conspiracy Count

Venezia argues that the Government failed to prove that he was a part of the conspiracy.²⁰ He contends that the evidence established nothing more than that he was a customer of Budget Films, who bought and sold films to Budget. When viewed in the light most favorable to the Government the evidence shows much more.

¹⁹The value of the films in each count could properly be aggregated to satisfy the \$5,000 requirement, since their transportation was charged as a single offense. *Schaffer v. United States*, 362 U.S. 511, 517 (1960).

²⁰Venezia's role in the alleged conspiracy was described in the indictment:

"The defendant BRUCE M. VENEZIA was furnished information by ALBERT C. DREBIN and LAWRENCE S. FINE concerning the inventory of 'pirated' films available for sale and stored at Budget Films, Inc., and acted in the capacity of a salesman of these 'pirated' films on behalf of Budget Films, Inc."

Unindicted co-conspirator Katz testified that in November, 1974, Venezia offered to sell him a package of television films that "Budget Films had . . . stored away", which Katz purchased for \$8,000. During the same period, Venezia offered to sell Katz a copy of the motion picture "Golden Needles", which Venezia said was stored at Budget Films. Venezia drove Katz to Budget Films, went inside, came out with a copy of the film and gave it to Katz. On one occasion Venezia warned Katz that the Federal Bureau of Investigation was investigating copyright violations. During an interview with two F.B.I. Special Agents, Venezia made the false exculpatory statement that he had never sold films to Harry Katz. This evidence was sufficient to establish Venezia as a member of the conspiracy.²¹ See *United States v. Knight*, 416 F.2d 1181 (9 Cir. 1969).

IV. Instructions

A. Criminal Copyright Infringement

The district court instructed the jury on the first sale doctrine as follows:

"Now, the clause in that statute [17 U.S.C. § 27]²²—and I quote—'the possession of which

²¹*United States v. Falcone*, 311 U.S. 205 (1940), relied on by appellants, is factually distinguishable. There, the only relationship between the defendants and other conspirators was that the defendants furnished raw materials to the conspirators, knowing that they would be used in the production of illicit distilled spirits. Here, Venezia was directly involved, as indicated by his conduct, in the conspiracy to illegally sell copyrighted motion pictures.

²²17 U.S.C. § 27 provides in pertinent part:

" . . . but nothing in this title shall be deemed to forbid, prevent, or restrict the transfer of any copy of a copyrighted work the possession of which has been lawfully obtained."

(This footnote is continued on next page)

has been lawfully obtained' as used in that statute means that title and ownership has passed to the one who has obtained possession lawfully.

"The statute I have just read to you incorporates what is commonly referred to as the 'first sale' doctrine. Under that doctrine, if the copyright proprietor transfers title to another party of his copyrighted protected (sic) work, that other party is then free to sell the specific work transferred. . . ."

In giving the instruction, the court relied on Judge Friendly's comments in *Platt & Munk Co. v. Republic Graphics, Inc.*, 315 F.2d 847 (2 Cir. 1963). *Platt & Munk* involved a civil action for injunction by the copyright holder (*Platt & Munk*) on several educational toys against the company which had contracted to produce the toys. *Platt & Munk* had refused to pay for the toys because of alleged manufacturing defects, whereupon the manufacturer attempted to sell them to a third party. The court held that such sale would infringe the copyright since "mere possession" of the copyrighted property did not carry with it the right to sell the property under 17 U.S.C. § 27. Rather, a transfer of title or ownership was necessary to terminate the copyright protection. 315 F.2d at 851-853.

Appellants contend that the instruction was erroneous because the words of the statute require only a transfer of possession, not title, to terminate copyright protection against unauthorized vending. Appellants argue

As noted in *United States v. Wise, supra*, this court recognized that, "Although the statute speaks in terms of a transfer of possession, the judicial gloss on the statute requires a transfer of title before a 'first sale' can occur". 550 F.2d at 1187.

that the statute must be strictly construed in a criminal prosecution and rely on *United States v. Wells*, 176 F.Supp. 630 (S.D. Tex. 1959) as supportive of their position.

While the statute speaks in terms of a transfer of possession, the cases have consistently construed § 27 to require a transfer of title or ownership, rather than mere possession, before copyright protection is terminated. *Harrison v. Maynard, Merrill & Co.*, 61 F. 689, 691 (2 Cir. 1894); *Independent News Co. v. Williams*, 293 F.2d 510, 517 (3 Cir. 1961); *Platt & Munk, supra*. Nor does *United States v. Wells* support appellants. *Wells* was a prosecution for criminal copyright infringement for the unauthorized sale of aerial survey maps, the copyright on which was held by Edgar Tobin. Tobin had licensed "negatives" of his maps to 107 customers with the right to reproduce copies of the maps for their own use, but restricting the right to sell copies. The defendant, one of the 107 customers, sold one of the maps. The court noted that: "The present case involves the relationship between the copyright proprietor and his licensee, which seems to lie between the two clear examples of the purchase and mere possession relationships." 176 F. Supp. at 634. "The pivotal issue is whether *title* to the particular copy has been retained by the copyright proprietor or has passed to a first purchaser." 176 F.Supp. at 633 (emphasis added). The court held that "[s]ince the Tobin license does not specify that all copies published thereunder remain the property of the copyright proprietor, it follows that *title* to all copies published under the license belongs to the licensee", thereby terminating the copyright protection against the vending of the copies. 176 F.Supp. at

634 (emphasis added). Thus, although *Wells* did not involve a sale situation, the court nevertheless regarded the transfer of title as the *sine qua non* of the first sale doctrine. *Wells* is consistent with *Platt & Munk* and the weight of authority. The court's instruction was proper.

Appellants also challenge the refusal of the district court to give several of their proposed instructions. Appellants' Proposed Instruction 31A, based on Uniform Commercial Code § 2-403, stated:

Any entrusting of possession of goods to a merchant who deals in goods of that kind gives him the power to transfer all rights of the entrustor to a buyer in the ordinary course of business.

Appellants contend that the instruction was supported by *Independent News Co. v. Williams, supra*. From the preceding discussion, however, it is clear that the instruction was properly refused since mere possession is insufficient to invoke the first sale doctrine. *Independent News* is distinguishable. In that case the applicability of the Uniform Commercial Code was discussed, not in connection with copyright infringement, but in connection with a claim of conversion. The court, in discussing the claim of copyright infringement, found the first sale doctrine applicable, not on the basis of the Uniform Commercial Code, but because title to the goods had passed from the copyright owner. Defendants' Proposed Instruction 31A was properly refused.

Appellants contend that the court erred in refusing to give their proposed instructions 31D and 30B, concerning the transfer of title to prints sold to salvage companies. Citing *Harrison v. Maynard, Merrill & Co., supra*, and *Independent News, supra*, appellants argue

that transfers of worn-out film prints to salvage companies are, in effect, sales which transfer title to the prints to the salvage companies. While appellants are correct,²³ their proposed instruction 31D was a misstatement of the law. It stated in part that the right to restrain the sale of particular film prints under the copyright law ceases ". . . when the owner of a copyright and of the copy has parted with his *possessionary* rights thereto". [Emphasis added.] Instruction 31D was premised on the false assumption that a transfer of possession activates the first sale doctrine, and was properly refused.

Instruction 30B²⁴ was based on sections 2106(1) and 2401(2) of the California Commercial Code and concerned the passage of title in a sales transaction. Appellants contend that the refusal of the court to instruct the jury that the legal effect of sales to salvage companies was the passage of title was "fatal to the main defense presented by the defendants". However, the court did instruct the jury that "[a] sale occurs when the seller transfers to the buyer the title and possession of property for a price which may be paid in installments or in a lump sum". This instruction was sufficient to inform the jury that a sale involves the passage of title. Instruction 30B was properly refused.

²³The court did instruct the jury that if it found that "the title to any of the prints involved in the Inductment passed to the licensee or salvage company", it should find that the prints as to which title passed had been sold, and lacking protection of the copyright laws there could be no infringement and the defendants should be acquitted.

²⁴Defendants' Proposed Instruction 30B read:

A "sale" consists in the passing of title from the seller to a buyer for a price. Unless otherwise explicitly agreed, title passes to the buyer at the time and place at which the seller completes his performance with reference to the physical delivery of the goods.

B. Interstate Transportation of Stolen Property

Appellants argue that the court erred in its instruction defining "value" under 18 U.S.C. § 2311. The court instructed the jury that:

The Government must establish beyond a reasonable doubt in Counts 2 through 4 that the value of the stolen goods, wares, and merchandise was in excess of \$5,000.00.

Value means the face, par or market value, whichever is greatest, and the aggregate value of all goods, wares and merchandise in a single count of the Indictment shall constitute the value thereof.

Market value usually refers to what a willing buyer would pay a willing seller. But if you find that the type of goods, which are the subject matter of this indictment, have no market value, then you may consider any reasonable method to ascribe an equivalent monetary value to them.

Appellants contend that the instruction was erroneous because the court did not limit the definition of value to market value, arguing that the jury was thereby allowed to arbitrarily choose any method of valuation it desired. They also argue that ample evidence of a market existed, consisting of a substantial number of film collectors.

We conclude that the court's instruction was proper. It was phrased in terms of 18 U.S.C. § 2311²⁵ and of language approved in *United States v. Lester*,

²⁵18 U.S.C. § 2311 states in pertinent part:

"Value" means the face, par, or market value, whichever is the greatest, and the aggregate value of all goods, ware, and merchandise, securities, and money referred to in a single indictment shall constitute the value thereof.

282 F.2d 750 (3 Cir. 1960). The Third Circuit in *Lester* held that where goods have no readily ascertainable market value, "any reasonable method may be employed to ascribe an equivalent monetary value to the items". 282 F.2d at 755.²⁶ While there was some evidence of a market for films among collectors, this was essentially a "black market", and there was no evidence that the prices paid reflected the actual worth of the films.

Finally, appellants contend that the court erred in refusing to give their proposed instructions 17A and 19A, to the effect that motion picture photoplays are intangibles and cannot be considered "goods, wares or merchandise" under 18 U.S.C. § 2314. It is argued that "a copyright is an intangible property right, separate and distinct from any property right in the tangible item from which such copies may be made". Appellants also contend that a copy cannot be acquired by theft, conversion or fraud within the meaning of § 2314 because a copyright owner has no proprietary interest in duplicates of his work. These contentions are both illogical and contrary to law. Copies are considered goods or merchandise for purposes of the statute. *United States v. Seagraves*, 265 F.2d 876, 880 (3 Cir. 1959). Moreover, illicit copying of a

²⁶*Abbott v. United States*, 239 F.2d 310 (5 Cir. 1956) and *United States v. Nall*, 437 F.2d 1177 (5 Cir. 1971), relied on by appellants as supportive of a strict market value instruction, are not persuasive. As noted in *Lester*, 282 F.2d at 755, the court in *Abbott* recognized that the \$5,000 value requirement was intended to limit the federal sanction to the theft of things having a "substantial value". To the extent that *Abbott* may be inconsistent with *Lester*, we adhere to *Lester*. *Nall* is factually distinguishable since the only evidence of value in that case was the owner's subjective opinion, which the court held was not a reasonable method of determining value.

copyrighted work is no less a "theft, conversion or taking by fraud" than if the original were so taken. See *United States v. Bottone*, 365 F.2d 389 (2 Cir. 1966).²⁷

IV. Prosecutorial Misconduct

Appellants contend that they were denied a fair trial by comments made by the prosecutor which inflamed the jury and by the prosecutor's improper cross-examination of defense witnesses. It is argued that the jury was inflamed by the prosecutor's statement in final argument that the movie industry was losing hundreds of thousands of dollars in revenue annually through unauthorized sales of motion picture films. However, this comment was fully supported by the evidence and was not objected to by appellants. The prosecutor also referred to appellants and their sales of film as "pirates" and acts of "piracy". The word "pirate" and its variations have come to be used synonymously with acts of infringement. 17 U.S.C. §§ 106 and 107 refer to "piratical" works, and the words "pirate" and "piracy" have been used by courts synonymously with infringement. See *e.g.*, *Goldstein v. California*, 412 U.S. 546 (1973); *Duchess Music Corporation v. Stern*, 458 F.2d 1305 (9 Cir. 1972). We conclude that the prosecutor's comments were proper.

During cross-examination of Budget's bookkeeper, Government counsel asked her: "Isn't it a fact that the defendant, Albert Drebin, destroyed many of the documents regarding sales prior to the search that was conducted?". No objection to the question was

²⁷Appellants' contention regarding the insufficiency of the evidence of whether the films sold were originals or duplicates is likewise without merit.

made by defense counsel. No evidence was presented by the Government to corroborate the implication present in the question. While the question exceeds the bounds of proper cross-examination, it concerned a collateral point in the case (an inconsistency between the testimony of the bookkeeper and the F.B.I. agents who searched Budget) and was not plain error.

The prosecutor, during cross-examination of another defense witness, asked him whether he had sold a copy of the film "The Exorcist", to which a defense objection of irrelevance was sustained. This question was raised on three later occasions; each time the objection was sustained and the jury admonished to disregard the question. No prejudice to appellants is apparent from these facts since the court properly refused the evidence and admonished the jury.

VI. Ambiguity of Verdict

Venezia contends that the verdict against him was ambiguous since it did not specify whether he was convicted of a misdemeanor or a felony, both of which were charged in the conspiracy count on which he was convicted. We agree with the Government that the jury's general verdict of guilty is a finding that Venezia was guilty "as charged"—guilty of conspiracy to commit both misdemeanor and felony violations. See *Phillips v. United States*, 264 F. 657, 659 (5 Cir. 1920), *cert. denied*, 253 U.S. 491 (1920). Moreover, Venezia objected to the use of special verdicts and thereby waived any objection to use of the general verdict. See *United States v. Jones*, 425 F.2d 1048, 1057 (9 Cir. 1970). In any case, we fail to find any prejudice to Venezia since his sentence did not exceed the maximum allowable for a misdemeanor.

VII. Statute of Limitations

Appellants contend that their convictions on counts two, three, and four (interstate transportation of stolen property in violation of 18 U.S.C. § 2314) are barred because the Government failed to prove that the property was "stolen, converted or taken by fraud" within the applicable statute of limitations, 18 U.S.C. § 3282. This section provides that the indictment must be found "within five years after [the] offense shall have been committed".

It is well settled that a statute of limitations begins to run when "the crime is complete". *Toussie v. United States*, 397 U.S. 112, 115 (1970). The crime is complete as soon as every element in the crime occurs. The offense charged is the interstate or foreign transportation of stolen goods. The crime is not complete until the stolen goods are transported. The Government's proof established that the interstate transportation occurred well within five years before indictment was returned. It was not necessary to show that the thefts also occurred within the five year period. See *Mitchell v. United States*, 196 F. 874, 878 (9 Cir. 1912).²⁸

²⁸*Carroll v. United States*, 326 F.2d 72 (9 Cir. 1963), relied on by appellants, is distinguishable. Carroll was charged with fraud in the sale of securities. The securities had been purchased and paid for more than five years before the indictment was returned, although the certificates were mailed within the five year period. The court held that mailing the certificates was not the "essence of the offense" and was "merely incidental and collateral to it, and not a part of it", even though the mailing provided the basis for federal jurisdiction. Here the interstate transportation was a necessary element, and part of the "offense" itself, and was completed within the period of the statute of limitations.

VIII. Collateral Estoppel

Appellants argue that their prosecution is barred by the doctrine of collateral estoppel because previous film piracy cases have found that motion picture studios, including some involved in this case, have sold their films.²⁹ However, the two essential requirements of collateral estoppel are lacking. There is neither identity of issues nor identity of parties between this case and those relied upon by appellants. *United States v. Wise*, 550 F.2d 1180, 1187-1188 (9 Cir. 1977).

Affirmed.

²⁹*American International Pictures, Inc. v. Foreman*, 400 F. Supp. 928 (S.D. Ala. 1975); *United States v. Nagy*, (unreported) (N.D. Ind. 1975).

APPENDIX 3.

Search Warrant.

United States District Court, for the Central District of California.

United States of America vs. The Premises Known As Apartment 16, 1101 North Hacienda Place, West Hollywood, California. Docket No., Case No.

To any Special Agent of the FBI or any authorized officer. Affidavit(s) having been made before me by John W. Orr, Special Agent, FBI, that he has reason to believe that on the premises known as Apartment 16, 1101 North Hacienda Place, West Hollywood, California, which is described as being one unit of a 17 unit, two story, multi-residential dwelling constructed of frame and stucco materials, tan in color, with brown trim. This particular unit is on the first floor and faces the 8500 West block of Holloway Drive, West Hollywood, California, with its entrance made accessible by a stairway bordering the front sidewalk of this multi-residential dwelling and apartment paralleling Holloway Drive. Apartment 16 is the only unit in the complex which fronts on the ground level of Holloway Drive and located immediately to the left of the door is a sign reading "Manager"; and all storage areas over which the tenant of Apt. 16 exercises authority.

In the Central District of California there is now being concealed certain property, namely illegally reproduced or stolen copies of various size motion picture films and/or video cassettes, which are duly copyrighted and protected by the provisions of the United States Copyright Laws embodied in Title 17, United States Code, Sections 1 and 104; books, records, papers,

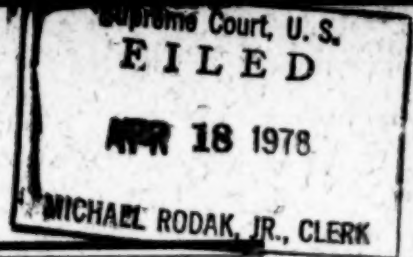
other documents and equipment relating to the duplication, manufacture, sale and distribution of copyrighted motion pictures, and used in the duplication, manufacture, sale, and distribution of said motion pictures; which are the fruits and instrumentalities and evidence of a violation of Title 17, United States Code, Sections 1, and 104, and a new copyright law as amended January 1, 1978, Title 17, United States Code, Sections 501, 506, and 509. And as I am satisfied that there is probable cause to believe that the property so described is being concealed on the person or premises above described and that grounds for application for issuance of the search warrant exist as stated in the supporting affidavit(s).

You are hereby commanded to search within a period of 7 days (not to exceed 10 days) the person or place named for the property specified, serving this warrant and making the search in the daytime (6:00 a.m. to 10:00 p.m. and if the property be found there to seize it, leaving a copy of this warrant and receipt for the property taken, and prepare a written inventory of the property seized and promptly return this warrant and bring the property before L.A. Duty Magistrate as required by law.

Dated this 2nd day of February, 1978, 5:03 p.m.

VENETTA S. TASSOPULOS
Federal Magistrate.

No. 77-1161



In the Supreme Court of the United States
OCTOBER TERM, 1977

ALBERT C. DREBIN, *et al.*, PETITIONERS

v.

UNITED STATES OF AMERICA

**ON PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR
THE NINTH CIRCUIT**

BRIEF FOR THE UNITED STATES IN OPPOSITION

WADE H. MCCREE, JR.,
Solicitor General,

BENJAMIN R. CIVILETTI,
Assistant Attorney General,

JEROME M. FETT,
JOHN J. KLEIN,
Attorneys,
Department of Justice,
Washington, D.C. 20530.

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BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The original opinion of the court of appeals (Pet. App. 4-33) is reported at 557 F.2d 1316. The amended opinion on rehearing (Pet. App. 1-2) is not reported.

JURISDICTION

The judgment of the court of appeals was entered on July 21, 1977. The order on rehearing (Pet. App. 1-2) was entered on January 23, 1978. The petition

for a writ of certiorari was filed on February 16, 1978. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether the admission of unlawfully seized evidence was harmless error.
2. Whether the evidence was sufficient to support petitioners' convictions.

STATEMENT

Following a jury trial in the United States District Court for the Central District of California, petitioners were convicted on six counts of willful copyright infringement for profit, in violation of 17 U.S.C. 104; three counts of interstate and foreign transportation of stolen property, in violation of 18 U.S.C. 2314; and one count of conspiracy to commit those offenses, in violation of 18 U.S.C. 371. Petitioner Drebin was sentenced to concurrent one-year terms of imprisonment on each count and fined \$20,000; all but three months of each prison term was suspended, and Drebin was placed on probation for three years. Petitioner Fine was sentenced to concurrent nine-month terms of imprisonment on each count and fined \$10,000; execution of the prison sentence was suspended and Fine was placed on probation for three years. Petitioner Budget Films was fined a total of \$18,000.¹ The court of appeals af-

¹ Co-defendant Bruce Venezia was convicted of conspiracy. He was sentenced to six months' imprisonment; execution of

firmed (Pet. App. 4-33). On petition for rehearing, the court of appeals reversed the convictions on three of the copyright infringement counts (Pet. App. 1-2). The court remanded for a new trial on those three counts and for resentencing on the seven remaining counts.

1. Petitioners were convicted for illegally selling prints of copyrighted motion picture films to three unindicted co-conspirators who operated film libraries or rental agencies in the Republic of South Africa. Twenty-six films were named in the conspiracy count, and six of these, one in each copyright infringement count, were also specified in the substantive charges against petitioners.² Petitioners stipulated that each of the films listed in the indictment had been validly copyrighted (Tr. 4177).

The evidence at trial showed that petitioner Budget Films was a corporation licensed to lease films produced by several major film studios. Petitioner Drebin was Budget's president. Petitioner Fine was the corporation's vice-president and later its secretary-treasurer. On September 11, 1974, unindicted co-conspirator John Holmes purchased approximately 81 film prints from petitioners for over \$14,000 (Tr. 1584-1590, 1640-1642). Holmes received the prints in South Africa on September 26, 1974 (Tr. 1587,

the sentence was suspended, and he was placed on two years' probation and fined \$1,000.

² The films specified in the copyright infringement counts were "Paper Moon," "The Way We Were," "Hot Rock," "Forty Carats," "The Take," and "The New Centurions."

1590).³ On two occasions in June 1974, unindicted co-conspirator Peter Theologo purchased television films from Drebin and Fine. He paid \$14,700 for prints of approximately 200 different episodes drawn from several television dramatic series (Tr. 1776-1782, 1788-1795). The prints involved in both transactions were shipped to South Africa (*ibid.*). Harry Katz, the third unindicted co-conspirator, paid \$1,075 for three film prints purchased from petitioners Drebin and Fine around June 25, 1974 (Tr. 1856-1862).⁴ Several days later, on June 29, 1974, Katz purchased three more movie prints from Fine for approximately \$1,000 (Tr. 1869-1873).

Representatives of nine motion picture and television studios that had produced all the films charged in the indictment testified for the government. They stated that the copyrighted films named in the indictment had been distributed only under licensing arrangements and that no prints of those films had ever been sold (Tr. 295-297, 464, 682-683, 845, 1023, 1198, 1277, 1391, 1481). They testified further that petitioners had not been authorized to sell or possess any of the films specified (Tr. 325, 345-346, 515-518, 703-704, 881-882, 1051, 1303, 1407, 1506-1507).

³ Included among the prints purchased by Holmes were four copies of "The Way We Were," one copy of "Hot Rock," four copies of "Forty Carats," and two copies of "The New Centurions" (Tr. 1590).

⁴ Included among the prints purchased by Katz were two copies of "The Take" and one copy of "Paper Moon" (Tr. 1857, 1865).

The nine film studio representatives also described the manner in which worn films are destroyed. Eight of the companies employed professional film salvage firms to process their used films (Tr. 339, 615-618, 784-786, 885, 1054, 1216, 1363-1373, 1534-1535). Salvage company representatives testified that worn prints are either burned, shredded, washed to remove the images, or cut into short segments and sold as "leader" strips to be used for the identification and protection of new reels of film (Tr. 3438, 3447, 3473). They also testified that their firms destroy old films pursuant to contracts with motion picture studios and others in the film industry (Tr. 3412-3413, 3420, 3447, 3471-3473, 3493). They indicated that salvaged film, when resold in the form of "leader" strips, is made available in segments no longer than 300 feet (Tr. 3481-3484). The "leader" film is sold only to a small number of film editing companies, which certify that they will destroy the film (Tr. 3422-3424, 3465). Salvaged film is not sold to the public (Tr. 3421).

2. On January 7, 1975, agents of the Federal Bureau of Investigation obtained a warrant to search the premises of Budget Films and to seize illegally reproduced and stolen films, business records relating to the manufacture and marketing of such films, and equipment used in the unlawful enterprise.⁵ The fol-

⁵ The search warrant authorized FBI agents to seize the following (Pet. App. 7):

lowing day several agents executed the warrant; they seized 551 films and several file cabinets and boxes filled with business records. Petitioners moved to suppress these materials, contending that the affidavit in support of the warrant did not state probable cause and that the warrant itself did not specify the property to be seized with sufficient particularity to satisfy Fourth Amendment requirements. The district court denied the motion (Tr. 33-96). At trial the government introduced 21 documents seized during the search.* FBI Agent Lawrence Henkel, who had supervised the search, testified concerning information acquired during execution of the warrant. According to Agent Henkel, no record of film sales by

* * * illegally reproduced and stolen copies of 35 mm, 16 mm, and 8 mm motion picture films which are duly copyrighted and protected by the provisions of the United States Copyright law embodied in Title 17, United States Code; books, records, papers and other documents relating to the manufacture and sale of such motion pictures and equipment used in the sale and distribution of such motion pictures which are the fruits and instrumentalities of violations of Title 17, United States Code, [Section 104, and Title 18, United States Code, Sections 2,] 371 and 2314.

* The documents showed petitioner Drebin's familiarity with copyright law and co-defendant Venezia's association with the illegal scheme. Among the documents were a Budget Films catalog and supplement in which petitioners offered films for sale, three letters from a company called Ivy Films relating to Budget's unauthorized leasing of films licensed exclusively to Ivy for distribution, communications with the Library of Congress and the Copyright Office, three publications dealing with copyright laws, and eleven cancelled checks payable to co-defendant Venezia (Tr. 2539-2571, 2830-2831).

Budget was discovered during the search, and every can of film at Budget displayed a printed warning recommending the exercise of caution to avoid film theft (Tr. 2573-2574, 2586-2587).

The court of appeals concluded that the warrant was invalid because it authorized an unlawful general search of Budget's premises. The court found that the warrant "provided no guidelines for the determination of which films had been illegally reproduced" and thus "left to the executing officers the task of determining what items fell within the broad categories stated in the warrant" (Pet. App. 8-9). The court ruled, however, that the district court's error in admitting evidence seized during the search was harmless beyond a reasonable doubt. The court found that the documents introduced to show petitioner Drebin's familiarity with copyright law had not contributed to his conviction because Drebin had stipulated that he was "completely familiar with the copyright laws of the United States, including the criminal provisions" (Pet. App. 10; Tr. 2964-2965). The court further observed that Agent Henkel's testimony and all the evidence obtained from the search, except the cancelled checks,⁷ had been offered to prove willfulness. On appeal, petitioners did not challenge the sufficiency of the evidence regarding that element of the offenses with which they were

⁷ The court of appeals concluded that introduction of the cancelled checks was harmless "in light of other untainted evidence * * * which was sufficient to establish Venezia as a member of the charged conspiracy" (Pet. App. 12).

charged, and, in any event, the independent, untainted evidence of willfulness was overwhelming (Pet. App. 10-11).

ARGUMENT

1. Petitioners contend (Pet. 8) that the court of appeals should not have made a finding of harmless error without first remanding to the district court for a hearing to determine whether the government used illegally seized material to develop other evidence produced at trial. This argument is without merit.

While the government bears the burden of showing that the evidence introduced at trial was not derived from an unlawful search, a defendant "must go forward with specific evidence demonstrating taint" before the government is required to meet its burden of persuasion. *Alderman v. United States*, 394 U.S. 165, 183; *Nardone v. United States*, 308 U.S. 338, 341; *United States v. Villano*, 529 F. 2d 1046, 1058 (C.A. 10), certiorari denied, 426 U.S. 953; *United States v. Crouch*, 528 F. 2d 625, 629 (C.A. 7), certiorari denied, 429 U.S. 900; *United States v. Pike*, 523 F. 2d 734, 736 (C.A. 5). Petitioner did not suggest in either the court of appeals or the district court that any evidence other than the documents seized and Agent Henkel's testimony was the product of the illegal search and therefore should be suppressed. They may not raise such a claim for the first time here. *Lawn v. United States*, 355 U.S. 339, 362-363 n. 16; *United States v. Lovasco*, 431 U.S. 783, 788 n. 7.

Moreover, even now petitioners point to only one additional piece of evidence allegedly obtained from the illegal search—petitioner Drebin's stipulation that he was thoroughly familiar with the copyright laws of the United States. This stipulation, however, was in no sense compelled by the admission of documentary evidence seized from the offices of Budget Films. The denial of petitioners' suppression motion in the district court did not require Drebin to stipulate to facts that the disputed documents tended to prove.* Drebin could easily have remained silent and thereby preserved his objection for appeal. Accordingly, the court of appeals did not err in failing to remand for the hearing that petitioners assert was necessary.

Petitioners also challenge (Pet. 9-12) the court of appeals' conclusion that admission of evidence actually seized in the illegal search was harmless error. That evidence was introduced for the sole purpose of demonstrating the willful nature of petitioners' copyright infringement. Whether the government presented sufficient independent, untainted evidence to establish the willfulness of petitioners' conduct is a purely factual question that does not merit review by this Court. In any event, as the court of appeals' summary of the evidence indicates (Pet. App. 11-

* This case is not like *Harrison v. United States*, 392 U.S. 219, where petitioner testified in order to explain certain illegally obtained confessions that had been wrongfully admitted into evidence.

12), the independent proof of willfulness was "overwhelming."

2. Under the so-called "first sale doctrine," the prosecution in a criminal copyright infringement case must prove that the particular copy or copies of a copyrighted work sold by defendant were not first sold by the copyright owner. As explained in *United States v. Wise*, 550 F. 2d 1180, 1187 (C.A. 9), certiorari denied, October 31, 1977 (No. 77-5457): "[T]he first sale doctrine provides that where a copyright owner parts with title to a particular copy of his copyrighted work, he divests himself of his exclusive right to vend that particular copy." * See also *United States v. Atherton*, 561 F. 2d 747, 750 (C.A. 9). Petitioners now urge (Pet. 12-15) that the government has not carried its burden of establishing that the film prints sold by petitioners had not been first sold by the copyright owners. The court of appeals correctly concluded (Pet. App. 1-2, 15-20) that, at least with respect to the three copyright infringement counts on which the convictions were affirmed, the government's evidence was sufficient.

At trial, the government attempted to show that the copyright owners had never sold *any* prints of the films specified in the copyright infringement counts and, *a fortiori*, that the prints sold by peti-

* The first sale doctrine is derived from 17 U.S.C. 27, which provides in pertinent part:

[N]othing in this title shall be deemed to forbid, prevent, or restrict the transfer of any copy of a copyrighted work the possession of which has been lawfully obtained.

tioners had not been "first sold." Film studio representatives testified that prints of the films in question had been distributed exclusively under licensing arrangements and that none had been sold. The court of appeals reviewed the license agreements and found that none constituted sales.¹⁰ Petitioners now assert, however, that defense evidence established that a print of the film "Dillinger"—one of the 26 films named in the conspiracy count of the indictment—had been first sold by its copyright owner to a film salvage company, which in turn had sold the com-

¹⁰ On rehearing, it appeared that the license agreements between Columbia Pictures and the American Broadcasting Company ("ABC") concerning the right to televise three of the six films named in the copyright infringement counts were identical to an agreement between the same parties regarding another film that the court of appeals, in an earlier case, had treated as a sale. See *United States v. Wise*, *supra*, 550 F.2d at 1191, 1194. As a consequence, the court of appeals found that "first sales" had occurred in connection with the three films in this case that had been licensed to ABC. The court reversed petitioners' copyright infringement convictions on the counts specifying these three films and remanded for a new trial at which, the court said, the government would be required to prove the source of the prints sold by petitioners. We believe this was error. The three films involved were "The Way We Were," "Forty Carats," and "The Take." As indicated previously (see notes 3 and 4, *supra*), the evidence at trial showed that petitioners had sold four copies each of the first two films and two copies of the third. Thus, even if, with respect to each film, one of the prints sold by petitioners was the print first sold to ABC, the additional prints could not have been "first sold", and the copyright infringement convictions should have been sustained on those counts.

plete print to a third party.¹¹ On this basis, petitioners contend that the other films listed in the indictment might also have been obtained from film salvage companies following legitimate first sales of the prints by the copyright owners. The argument is unpersuasive.

While the court of appeals has held that a sale to a salvage company may constitute a "first sale" for copyright purposes (see *United States v. Atherton*, *supra*, 561 F.2d at 751), the court in this case properly determined that the testimony of salvage company representatives was "sufficient to prove that [petitioners] did not obtain from salvage the films which they are charged with infringing" (Pet. App. 19). The salvage company witnesses stated that salvaged film is never sold intact, but is either destroyed or sold in short segments to film editing companies who use it to protect new film. The court found petitioners' evidence regarding the purchase of "Dillinger" "inconclusive and insubstantial" (Pet. App. 20). The defense witness, Charles Parker, testified that he did not know whether he had purchased a complete print of the film. Moreover, an executive of the copyright owner, American International Pictures, Inc., testified that no 16 mm print of "Dil-

¹¹ The film was allegedly purchased by Charles Parker, the fiance of petitioner Drebin's daughter. Parker testified that he bought the film from the salvage company for Hollywood Film Exchange, the employer of co-defendant Venezia (Tr. 3001-3007, 3019, 3025-3028). Parker further testified that he did not know whether he had purchased a complete copy of "Dillinger" or any other film (Tr. 3031-3032).

linger" had ever been sent to the salvage company patronized by Parker (Pet. App. 20; Tr. 4091-4093, 4102). Petitioners presented no evidence that any salvage company had ever sold a print of any of the six films named in the copyright infringement counts.

Contrary to petitioners' assertion, the court of appeals' decision did not involve a misapplication of the "first sale" doctrine.¹² The court simply made a factual determination that, under prevailing legal standards, the government's evidence was sufficient to support petitioners' convictions. This determination was correct and does not warrant review by this Court.

¹² The court of appeals in *Atherton* applied the "first sale" doctrine in a manner unduly favorable to copyright infringement defendants. It said that when at least one print of a copyrighted film has been "first sold" by the copyright owner, the prosecution in a criminal copyright infringement case bears the burden of affirmatively proving the source of the prints of that film sold by defendant. 561 F. 2d at 750-751. This was error. The prosecution's burden in such a case should be satisfied either by proof of the whereabouts of the "first sold" prints and a showing that the prints sold by defendant could not have been those first sold by the copyright owner or by proof that the number of prints sold by defendants was greater than the number of prints "first sold" by the copyright owner and that therefore defendant necessarily sold some prints in violation of the copyright laws. The court of appeals' comments in *Atherton* are detrimental to the prosecution and, as applied in this case, could only have helped petitioners. This issue, however, relates solely to the three reversed counts and thus affords no occasion for review of the convictions affirmed by the court of appeals, which are the ones under attack here by petitioners.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

WADE H. MCCREE, JR.,
Solicitor General.

BENJAMIN R. CIVILETTI,
Assistant Attorney General.

JEROME M. FEIT,
JOHN J. KLEIN,
Attorneys.

APRIL 1978.

Supreme Court, U. S.

FILED

APR 27 1978

MICHAEL RODAK, JR., CLERK

IN THE
Supreme Court of the United States

October Term, 1977

No. 77-1161

ALBERT C. DREBIN, BUDGET FILMS, INC., and LAW-
RENCE S. FINE,

Petitioners,

vs.

UNITED STATES OF AMERICA,

Respondent.

PETITIONERS' REPLY BRIEF.

GERALD M. SINGER,
GERALD F. UELMEN,

10100 Santa Monica Blvd., 26th Floor,
Century City North Building,
Los Angeles, Calif. 90067,

Counsel for Petitioners.

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IN THE Supreme Court of the United States

October Term, 1977
No. 77-1161

ALBERT C. DREBIN, BUDGET FILMS, INC., and LAW-
RENCE S. FINE,

Petitioners,

vs.

UNITED STATES OF AMERICA,

Respondent.

PETITIONERS' REPLY BRIEF.

Petitioners herein hereby reply to the Government's Brief under Rule 24(4) of the U.S. Supreme Court Rules, as follows:

1. The Issue of "Willfulness."

The Government contends that Petitioners failed to challenge the sufficiency of evidence regarding "Willfulness" on appeal. (Respondent's Brief "R.B." 7.) While it may be true that no enumerated issue was specifically identified as "Willfulness" in their Briefs, that issue was the overriding theme in their entire defense.

The "Willfulness" issue in a criminal copyright infringement by VENDING case, must be viewed in a light entirely differently from that of any other kind of criminal matter. In the usual criminal case, it is the conduct of the defendant which is subject to the

"Willfulness" consideration. Here, the conduct of Petitioners was the vending of motion picture film prints. Petitioners would not suggest that they did not "Willfully" vend prints of films. But this is not the kind of "Willfulness" which must be proved for conviction of that crime. In fact, the "Willful" vending of film prints is NOT a crime at all unless two other elements are proved by the Government: 1, That the particular prints with which the defendant is charged had never before been FIRST SOLD, and 2, That the defendant KNEW that the prints which he sold had never before been FIRST SOLD. 17 U.S.C. §27; *United States v. Atherton*, 561 F.2d 747, 750. The only effort that the Government made to "prove" either of these two elements was in its orchestration of testimony by film studio executives that "film prints are never sold, but only licensed." The *Atherton* court rejected this contention and analyzed the so-called "licenses," finding many of them in actuality, nothing but SALES. (At pp. 750, 751.)

No evidence at all, of any kind or nature, was offered by the Government to prove the "*scienter*" element which the *Atherton* court found necessary to convict. Aside from the rhetoric that "prints are never sold," there was nothing to even indicate that Petitioners KNEW that any of the prints with which they were charged had not been previously "first sold." As ruled in *Atherton*, it is not necessary to find an "outright sale," to establish that "first sales" had been made. (At 750.)

The trial court improperly instructed the jury on the crucial issue of the "First Sale Doctrine" thereby creating the erroneous impression upon the jury that the COPYRIGHT ITSELF, as well as the property

in the film prints, needed to be passed in a "First Sale."

"Now, the clause in that statute—and I quote—'the possession of which has been lawfully obtained' as used in that statute means that *title* and *ownership* has passed to the one who has obtained possession lawfully." (R.T. 4468.)

This unduly restrictive interpretation of the relevant statute not only denied Petitioners the broader statutory construction to which they were entitled under criminal laws, but impliedly refuted the application of the kinds of transactions described in *Atherton* held by that court to be "First Sales." Thus, such esoteric language as was found in certain contracts between the film studios and television networks and held by the Court of Appeals in this case, as well as in *Atherton*, to constitute "First Sales," and the other transactions, such as salvage sales and "V.I.P. licenses," etc., would not have occurred to the jury to satisfy the "First Sale" concept. These errors, plus the basic failure of the Government to offer any proof of the source of any of the prints charged to Petitioners, and merely to rely upon the precept that "films are never sold," all serve to automate the "Willfulness" defense.

Although Judge Hufstедler, in *Atherton*, distinguished between the terms, "Willfulness," and "*scienter*," that same distinction would apply here:

"The Government adequately proved infringement, willfulness, and profit, but it failed to negate first sale or to prove *Atherton's scienter*." (At 749.)

Even in the instance of one of the counts in *Atherton* in which the Government successfully proved the ab-

sence of a "First Sale," that Court still ordered that count reversed on ground that "scienter," or Atherton's knowledge of the absence of a "First Sale", had not been proved.

"The testimony was uncontroverted that 'THE EXORCIST,' at the time Atherton sold a copy of that print, had not been the subject of any television contracts, V.I.P. contracts, armed services contracts or airline contracts, and that no prints of the film had been sent to salvage companies. 'THE EXORCIST' copyright count must nevertheless be reversed because *the Government failed to prove that Atherton knew that no print of 'THE EXORCIST' had been subject to first sale.*" (At 752.) (Emphasis ours.)

Hence, it may be seen that the terms "Willfulness," and "scienter" and "knowledge," and other such terms, are so intertwined with the intricate and diverse interpretations of the "First Sale Doctrine," there can be no realistic contention that the absence of a formalized assignment of a term, such as "Willfulness," will deprive Petitioners of a full review of this entire package of elements.

That Petitioners' "Willfulness" should be subject to review is emphasized in the fact that three counts were ultimately reversed in this case after discovery by the Court of Appeals of three film studio-television network contracts containing the same esoteric language as referred to in both *Atherton* and *United States v. Wise*, 550 F.2d 1180, cert. den., Oct. 31, 1977 (No. 77-5457). Surely, the presence or absence of such language, or even those very contracts themselves, could not have been known to Petitioners at the time

of their sales of the film prints. It is the height of serendipity to hold Petitioners at their peril to know of the existence or lack thereof of such contracts and such language.

2. The "Harmless Error" Finding.

The Solicitor General misperceives the import of the requirement that a defendant "must go forward with specific evidence demonstrating taint," before the government is required to meet its burden of persuasion. *Alderman v. United States*, 394 U.S. 165, 183. In the *Alderman* case, the fact of the illegal search was not even known to those defendants until after the matter was presented for review to this Court. It is therefore not Petitioners' responsibility to establish the possibilities of taint prior to appeal, or even prior to submitting the cause to this Court for review. The requirement is simply that the defendant present such evidence at the adversary hearing before the Government needs to meet the burden. The failure of Petitioners to identify the source of all evidence which might be violative of their rights at this stage of the proceedings does not affect their rights to an ultimate determination of taint or lack of taint. Since the source of the Government's evidence is not made available to defendants at any time, unless under court order in such an adversary hearing, it would be an exercise in futility to require that defendants produce evidence of the taint of such sources prior thereto.

In this case, even more than in *Alderman*, there is more than sufficient evidence of the probability of taint as to much of the evidence used. Here, evidence WAS in fact used which was obtained in the illegal search and seizure. Petitioners have a right under such

circumstances to ascertain which, if any, other items of evidence may have been adduced as a result of leads found by the Government during its illegal search of the premises of BUDGET FILMS, INC.

3. Film Salvage Company Sales.

The Government now belatedly complains that the *Atherton* decision applied the "First Sale Doctrine in a manner unduly favorable to copyright infringement defendants." (R.B. 13, footnote 12.) Although the Government requested, and was granted, additional time for the preparation of its Petition to contest the *Atherton* decision in this Court, it failed to do so. Now, it seeks to make its point behind a gratuitous commentary.

The Government Shares the Misapprehension of the Court of Appeals as to the Significance of the Proof of Sales to Salvage Companies.

The reference by the Government to the rationale of the Court regarding its rejection of the purchase by a defense witness of prints of the film "DILLINGER," evidences that it shares in the Court's misunderstanding of the point. The "failure" of that purchase to dispel "the evidence sufficient to prove that appellants did not obtain from salvage the films which they are charged with infringing," (557 F.2d 1316, 1327) was totally irrelevant. Petitioners were certainly not required to prove either the absence of first sales or the source of the prints which they sold. All that was intended to be proved by that purchase was the fact that a) sales are made of prints to salvage companies and b) that salvage companies do in fact sell complete prints of films. Such proof should have been

sufficient, not to prove that Petitioners obtained their prints from salvage companies, but that a general policy statement that "films are never sold" is not enough to establish the absence of "First Sales," and that the Government bore the burden of tracing the prints which it claims had never before been "first sold."

No Evidence That Any Salvage Company Sold a Print of Any of the Six Prints Named in the Copyright Infringement Counts.

The Government points to the failure of Petitioners to bring evidence that the salvage companies ever sold prints of any of the six films charged in the Indictment. (R.B. 13.) This is the latest in the attempts by the Government to switch the burden of proof to defendants in this criminal case. Considering the obvious difficulties with which the Petitioners had to contend in obtaining evidence of what the studios or their salvage companies do, or do not do, it is surprising that a sale of even one film print was effected. But that print title, coincidentally being one of those charged to Petitioners as an "Overt Act," is indeed startling.

4. Misconduct of a Government Officer Emphasizes the Harmfulness of the Error.

The Government astonishingly avoided coming to grips with the cited blatant perjurious statements of one of the investigating F.B.I. officers. This issue deserves the most thorough and in-depth treatment. (C.T. 310; R.T. 991-98, 1973-75, 2017-18; Exh. AB, p. 12.)

5. Significant and Recurring Problems Concerning the Use of "Harmless Error" in Such Illegal Searches and Seizures as Present in This Case.

The Government also saw fit to ignore the fact that the very verbiage contained in the Warrant which was deemed in this case to be illegal, was contained in at least one Warrant used by the Government as late as this very year, 1978.

The deterrent effect which is doubtlessly intended in the Court's ruling on the illegality of the search and seizure in this case, had so little effect that the Government did not even make the slight attempt at altering the composition of words on the face of its Warrants. It is a travesty that on one hand, the Court makes a ruling that the error in the use of such a Warrant is "harmless," and on the other, the Government obviously utilizes such a ruling to continue in the nefarious practice of using the illegal content, knowing that its cases will stand up under the ruling of "harmless error." (See Appendix 3, Petitioners' Brief.)

Conclusion.

For the above reasons, the Petition for a Writ of Certiorari should be granted.

Respectfully submitted,

GERALD M. SINGER,

GERALD F. UELMEN,

Counsel for Petitioners.